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**International
Criminal
Court**

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Date: **4 May 2020**

PRE-TRIAL CHAMBER I

Before: **Judge Péter Kovács, Presiding Judge**
 Judge Marc Perrin de Brichambaut
 Judge Reine Adélaïde Sophie Alapini-Gansou

**SITUATION ON REGISTERED VESSELS OF THE UNION OF THE COMOROS,
THE HELLENIC REPUBLIC OF GREECE AND THE KINGDOM OF CAMBODIA**

Public Document

**Response of the Victims to the “Application for Judicial Review by the Government
of the Comoros” of 2 March 2020**

Source: **Rodney Dixon QC and Haydee Dijkstal, and Stoke & White LLP
(London) as Legal Representatives on behalf of Victims**

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Counsel for the Defence

Legal Representatives of Victims
Mr Rodney Dixon QC
Ms Haydee Dijkstal

Legal Representatives of the Applicant

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

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Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. The Victims of the attack on the Gaza Freedom Flotilla who are represented by the Legal Representatives for Victims, Rodney Dixon QC and Haydee Dijkstal, hereby file this response to the “Application for Judicial Review by the Government of the Comoros” of 2 March 2020.¹ This response is submitted in accordance with the Pre-Trial Chamber’s “Order on the filing of responses and replies” of 6 March 2020,² and its “Decision on the ‘Prosecution’s urgent request for extension of time” of 19 March 2020 which extended the deadline for Victims to file their response to 4 May 2020.³
2. The 378 Victims represented by the Legal Representatives for Victims were deeply disappointed by the Prosecutor’s third decision (of 2 December 2019) still not to open an investigation, after again reconsidering her decision at the direction of the Pre-Trial Chamber.⁴ It is most disconcerting that the Prosecutor’s conclusion, once again, that the Situation lacks sufficient gravity to proceed is based on the same repeated legal and factual errors. The Prosecutor continues to refuse genuinely to reconsider her decision in accordance with all of the specific directions in the Pre-Trial Chamber’s decision of 16 July 2015.
3. The Victims therefore fully support the application of the Government of the Comoros to judicially review again the Prosecutor’s decision. It is most regretful that it is necessary after the significant delays in this case to have to return again to the Pre-Trial Chamber. These delays significantly prejudice the rights of the Victims to be “*informed promptly as to whether or not they will be in a position to exercise their rights before this Court.*”⁵

¹ Application for Judicial Review by the Government of the Comoros, ICC-01/13-100, 2 March 2020 [*hereinafter* “Comoros Judicial Review”].

² Order on the filing of responses and replies, ICC-01/13-101, 6 March 2020, para. 4(a). See para. 4(a) which directs that the Victims response “shall not exceed 60 pages.”

³ Decision on the ‘Prosecution’s urgent request for extension of time’, ICC-01/13-106, 19 March 2020, para. 7, p. 5.

⁴ Final decision of the Prosecutor concerning the ‘Article 53(1) Report’ (ICC-01/13-6-AnxA), dated 6 November 2014, as revised and refiled in accordance with the Pre-Trial Chamber’s request of 15 November 2018 and the Appeals Chamber’s judgment of 2 September 2019, ICC-01/13-99.Anx1, 2 December 2019 [*hereinafter* “OTP Second Reconsideration Decision”].

⁵ Decision on the ‘Application for Judicial Review by the Government of the Union of the Comoros’, ICC-01/13-68, 15 November 2018, para. 120 [*hereinafter* “Second Decision requesting Reconsideration”].

4. For all these reasons, the Victims urge the Pre-Trial Chamber to find that the Prosecutor has again erred in law and fact and to direct her to reconsider her decision to correct these errors. Given the Office of the Prosecutor's (OTP) repeated failures to address and rectify these errors, the Victims further request that appropriate sanctions are imposed against the OTP to take into account the substantial delays caused by the OTP's deliberate refusal to comply with the directions of the Chamber, and to ensure future compliance with the Chamber's rulings.

II. OVERVIEW OF VICTIMS' INTERESTS AND CONCERNS

5. The Legal Representatives of the Victims submit this Response on behalf of 378 victims who have been accepted by the Victims Participation and Representation Section (VPRS) to participate in the ICC proceedings. In order to prepare this submission, participating Victims have been contacted to respond to the OTP's latest decision of 2 December 2019.⁶
6. The Victims were asked to share their views and concerns so that these could be communicated to the Court. Their responses have been relied on to prepare these submissions and certain are cited below. Before responding to the substance and merits of the Comoros's application for judicial review, the Legal Representatives for the Victims set out in detail the reaction of the Victims to the Prosecutor's third decision not to open an investigation. Article 68(3) "*permits [the Victims'] views and concerns to be presented*" to the Court when their interests are affected, and it is important that the Court is made aware of exactly how Victims are affected by the proceedings and how they view the latest decision of the Prosecutor.
7. When asked for their responses to the Prosecutor's decision again not to open an investigation, the Victims all expressed "*deep disappointment, powerlessness, some anger and some fear.*"⁷ A number of Victims reported "*sadness*"⁸ upon hearing of the

⁶ OTP Second Reconsideration Decision.

⁷ Victim a/40006/13.

⁸ Victim a/05011/14; Victim a/40035/13.

Prosecutor's decision. Others felt wounded,⁹ and stressed that the decision was like "a second blow."¹⁰ For example, Victims stated that:

- *"I am appalled at the Prosecutions failure to begin a full investigation."*¹¹
- *"I was personally offended and deeply hurt by the Prosecution's decision to again not open an investigation" ... it was a "demeaning and hurtful decision considering the strong evidence in videos and written testimonies."*¹²
- *"Although it is very clear that there is a crime, it is very sad that the investigation has not even started. I am anxious for humanity."*¹³
- *"I am very sad to encounter the decision that even an investigation will not be started against these world-known and condemned attacks. This damaged my believe in justice."*¹⁴
- *"I felt desperate when I found out that no investigation would be opened on December. Everything was ended. They gotten away with everything they had done to us."*¹⁵

8. It was highlighted that the Victims believe "there is a strategy to exhaust our calls for justice" and that "the Prosecutor just wishes we would be quiet and go away."¹⁶

9. Some Victims expressed their view that the Prosecutor's stubborn resistance against opening an investigation came across as though "a political decision is being made rather than a legal one."¹⁷ Victims similarly stated that:

- *"Sadly this appears to me to have been a political decision as opposed to a legal, facts based decision."*¹⁸
- *"This delay shows that, in fact, the political concerns affected the legal evaluation of the event."*¹⁹

⁹ Victim a/05089/14; Victim a/40004/13.

¹⁰ Victim a/05061/14.

¹¹ Victim a/05103/14.

¹² Victim a/05089/14.

¹³ Victim a/05011/14.

¹⁴ Victim a/40035/13.

¹⁵ Victim a/40007/13.

¹⁶ Victim a/40006/13.

¹⁷ Victim a/40006/13.

¹⁸ Victim a/40004/13.

¹⁹ Victim a/05022/14.

- *“We know that this delay is intentional. This incident is more than just an ordinary incident. We try to explain the inhuman situation we experience to people acting with purely political concerns.”*²⁰
 - *“Law shouldn’t work like this, So, there is something wrong.”*²¹
10. Importantly, the responses of the Victims described how the delays, and repeated refusal by the Prosecutor to open an investigation, *“affected us all negatively”*²² – many describing how the process *“has worn us down”*²³ and how *“[d]elays in the investigation are emotionally wearing.”*²⁴
11. Their responses echo the Chamber’s previous recognition that *“[e]xtended preliminary examinations affect the rights of victims and maintain them in a state of uncertainty which is prejudicial”*.²⁵ One Victim described the proceedings as *“a ‘heart consuming’ process ... A process that blinds one’s hopes”*²⁶, and another said that the *“process we live in is like a vicious cycle.”*²⁷
12. The Victims all expressed how the Prosecutor’s resistance to opening an investigation, and the seemingly endless delays in advancing the proceedings, had detrimentally affected them. For example:
- *“Because we follow the process closely, we are deeply affected by the decisions made or not. It is not possible otherwise.”*²⁸
 - *“I think the delays in ICC investigation resembles seeing a mirage in desert. We have thirsts for injustice after the tortures and abuses we experiences. Each time, I would like to end this thirst and drink ‘justice’. However, whenever I think that I have justice, I realize that it is a dream.”*²⁹
 - *“Every delay ... creates a new disappointment for us.”*³⁰

²⁰ Victim a/40022/13.

²¹ Victim a/05022/14.

²² Victim a/15009/15.

²³ Victim 1/05022/14. Victim a/15037/15 similarly stated *“The delay in opening the investigation has worn me and my family a lot.”*

²⁴ Victim a/15004/15, similarly stated by Victim a/15192/15.

²⁵ Second Decision requesting Reconsideration, para. 120.

²⁶ Victim a/40095/13.

²⁷ Victim a/15161/15.

²⁸ Victim 1/05022/14.

²⁹ Victim a/15071/15.

³⁰ Victim a/05061/14.

- “[T]he delay on the investigation affects me psychologically. The changes in my mood reflects to my family and friends too. Although I am aware that they are sad, this situation will stay the same for me because the judicial process is longer now.”³¹

13. The Victims’ reactions to further delays demonstrates why it is “*necessary for the victims to be informed promptly as to whether or not they will be in a position to exercise their rights before this Court.*”³² In many of their responses, they made clear that as a result of these delays their faith was beginning to fade and could not last forever³³: *[a]fter a while, people get tired of waiting. I’m not at that stage right now. But I’m about to reach to that stage. This means losing all hope ... I don’t want to experience any more delays.*”³⁴

14. A number of Victims conveyed that the extraordinary length of these proceedings and the determination of the OTP not to open an investigation, has already negatively affected their trust in the law,³⁵ and even caused some to “*los[e] faith and trust in the ICC.*”³⁶ Victims conveyed deep frustration in feeling that “*all roads are blocked.*”³⁷ Other Victims submitted, for example, that:

- “*I feel a loss of faith in the institution that is established to deal with crimes of the nature of those committed against the Freedom Flotilla passengers.*”³⁸
- “*The prosecutor’s office was our only hope so that what was done in the context of international criminal law would not go unpunished. However, it made me very sad that the prosecutor’s office did not open an investigation. ... The fact that the criminals are not punished will harm the trust in ICC.*”³⁹
- “*The decision not to open an investigation caused me to lose my belief in law and left me desperate.*”⁴⁰

³¹ Victim a/40007/13.

³² Second Decision requesting Reconsideration, para. 120.

³³ Victim a/15192/15 stated the “*persistence on still not opening a case makes me worried. I am about to lose my belief in international laws.*”

³⁴ Victim a/40081/13.

³⁵ Victim a/15037/15 stated that “*I tried to be strong thinking that legal sanctions will be applied against these actions. I was shocked to encounter the decision that the legal process was not implemented against this treatment to a group of people trying to bring hope for the Gaza people. I lost my trust in law.*” Similarly, Victim a/15192/15 stated the “*persistence on still not opening a case makes me worried. I am about to lose my belief in international laws.*”

³⁶ Victim a/40004/13.

³⁷ Victim a/15106/15.

³⁸ Victim a/40006/13.

³⁹ Victim a/15193/15.

⁴⁰ Victim a/40095/13.

- *“If these events do not require punishment according to the ICC, it is necessary to review what the ICC was established for.”*⁴¹
 - *“I leave this issue to the afterlife. One day justice will find its place.”*⁴²
15. Some Victims stated that they continued to have faith and hope in the ICC process, and acknowledged that “[w]hat matters ... is that our trust in law is not lost.”⁴³ Victims communicated such sentiments as *“I have never lost faith in justice”*⁴⁴ and *“I don’t want to lose my trust in justice. We experienced really hard things ... I want to keep my faith in justice. That’s why I’m hopeful.”*⁴⁵ Victims voiced their hope that the *“ICC will do something before the incident be forgotten.”*⁴⁶
16. A resounding concern for many Victims was that if the crimes committed during the attack on the Flotilla were allowed to go unpunished that *“it is sending a message that it is ok for these ‘war crimes’ (as found by the Prosecution’s office) to be perpetrated again in the future.”*⁴⁷ Similar concerns were expressed in regard to attacks on humanitarian aid workers and human rights advocates, that impunity in this case would make it *“possible for any state to attack humanitarian volunteers without hesitation in the future.”*⁴⁸ It was relayed that *“conducting this investigation and punishing criminals will be an example for states that will dare to commit such crimes later”* and that *“maybe we cannot bring back the dead, but it is in our hands as an international community to prevent new ones.”*⁴⁹

⁴¹ Victim a/15134/15.

⁴² Victim a/40060/13.

⁴³ Victim a/15037/15.

⁴⁴ Victim a/15009/15.

⁴⁵ Victim a/40029/13.

⁴⁶ Victim a/15037/15.

⁴⁷ Victim a/05092/14. Similarly, Victim a/05103/14 stated that *“It is hard to avoid despair that further inhuman acts will follow if the ICC fails to act”*; Victim a/40004/13 stated that *“This attack, and its lack of censure, will (has) become a precedent for future similar violations of law by Israel and other countries”*; Victim a/05089/14 stated that *“It is important to continue to seek justice before the ICC for myself and for other victims of Israeli government violence because until the international criminal judicial system holds the Government of Israel accountable for their crimes, they will continue to do them”*; Victim a/15041/15, stated that *“The greatest benefit of establishing justice here is undoubtedly the prevention of new massacres”*; and Victim a/05061/14 stated that finding that there is not sufficient gravity *“means that our suffering has no value, and it is encouraging to those who have committed these violations”*.

⁴⁸ Victim a/40087/13.

⁴⁹ Victim a/15192/15.

17. Importantly, the Victims want the Court to know that the ICC is truly their last resort for achieving justice.⁵⁰ For example, Victims, underlined that:

- *“I have no recourse to justice in another jurisdiction or forum which causes sadness, yet determination to continue” ... “There seems to be nowhere else for me to go in a quest for justice for crimes against myself, my colleagues and those who may seek justice in similar circumstances in future” ... “This is why we turn now to the ICC for justice after national attempts have failed.”⁵¹*
- *“[S]earching for justice with ICC is very important to me. I feel that the ongoing application to ICC is our last ditch. I cannot think of any other way.”⁵²*
- *“Because there is no other legal system in the international arena for this trial, ICC is the last resort.”⁵³*

18. Finally, in describing why the proceedings before the Court are so crucial, it was emphasised that *“[t]here must be a counterpart to all the abuse and torture I have experienced. I do not want the crimes committed against us to become history. That’s why it’s so important.”⁵⁴* Victims explained that they *“continue to seek justice before the ICC because this world needs a place where states can be held accountable for the crimes they commit”*, and *“States and governments cannot just do what they wish and get away with it.”⁵⁵* Another stated that *“Our only power is justice ... [and the] ICC means justice for me.”⁵⁶*

⁵⁰ For example, Victim a/40081/13 stated that *“ICC was my last chance in my search for rights.”*

⁵¹ Victim a/40006/13.

⁵² Victim a/40007/13.

⁵³ Victim a/40095/13.

⁵⁴ Victim a/40081/13.

⁵⁵ Victim a/05075/14.

⁵⁶ Victim a/40007/13. Similarly, Victim 1/15009/15 said *“The establishment of justice is important for everyone, not just for us ... What we expect from the ICC is nothing more than serving the establishment of justice.”*

GROUNDS OF REVIEW

19. The Victims will now set out their submissions in respect of each of the grounds of judicial review that have been raised.

The Prosecutor erred in not applying the correct legal standard for determining whether to open an investigation

20. The Victims submit that the Pre-Trial Chamber has clearly set out the correct legal standard to apply when determining whether to open an investigation under Article 53(1) of the Statute.⁵⁷
21. Without repeating the Chamber's legal standard⁵⁸, the Victims note that key to the applicable standard is that at this early stage of the proceedings it would be premature to disregard any evidence unless it was manifestly false, and that the existence of "*several plausible explanations of the available information*", "*facts that are difficult to establish, or which are unclear; or the existence of conflicting accounts are not valid reasons not to start an investigation but rather call for the opening of such an investigation.*"⁵⁹ It would plainly be premature for the Prosecutor to favour one version of the evidence over another at this stage without "*properly assessing the relevant facts*" within an investigation.⁶⁰ Even the Prosecutor accepts this legal standard and her obligation to apply it.⁶¹
22. Despite this acknowledgement, the Prosecutor has consistently failed genuinely to reconsider her decision not to investigate by faithfully applying the legal standard as interpreted by the Pre-Trial Chamber. This error persists in the Prosecutor's analysis of the evidence in respect of the factors for determining gravity under Article 53, including in her analysis of the scale of the crimes, the nature of the crimes, the impact of the crimes, and the manner of commission of the crimes. The Victims submissions below, which detail the errors the Prosecutor continues to commit in

⁵⁷ Rome Statute, Article 53(1). See, PTC First Decision requesting Reconsideration, paras. 13, 14.

⁵⁸ See, the summary of the Chamber's legal standard within the Comoros Judicial Review, paras. 28-31.

⁵⁹ PTC First Decision requesting Reconsideration, para. 13.

⁶⁰ PTC First Decision requesting Reconsideration, para. 13.

⁶¹ OTP Second Reconsideration Decision, para. 14.

regard to her gravity analysis, show how the Prosecutor has again failed to apply the Pre-Trial Chamber's legal standard.

23. As the Appeals Chamber made clear, the Pre-Trial Chamber can review and direct the Prosecutor again to reconsider her decision not to investigate if it is found that the Prosecutor did not genuinely reconsider her decision in accordance with the Chamber's decision of 16 July 2015.⁶² The Victims ask the Pre-Trial Chamber to find that because, among other reasons, the Prosecutor failed to properly and genuinely apply the legal standard of the Pre-Trial Chamber, that the Prosecutor's decision does not amount to a proper 'final decision'⁶³ and that the Prosecutor's errors must be corrected.

The Prosecutor erred in her consideration of those who bear the greatest responsibility for the crimes

24. The Government of the Comoros's submitted⁶⁴ that it was an error for the Prosecutor only to consider evidence it had and not to take into account its ability to investigate those responsible when determining whether those bearing the greatest responsibility for the alleged crimes might include senior military officials and political leaders (which would heighten the gravity of the potential cases).
25. By excluding evidence that was available to the Prosecutor and could be obtained concerning potential perpetrators, the Prosecutor failed to follow the Pre-Trial Chamber's instruction that she should have been considering her "*ability to investigate and prosecute those being the most responsible for crimes under consideration*"⁶⁵ – namely, her ability to investigate those most responsible if an investigation was opened.
26. The Victims wish to add that they would be able to provide valuable information that would allow the Prosecutor to investigate those most responsible, including those at the highest level. This includes the fact that Victims witnessed a fleet of large navy

⁶² AC Judgement, paras. 59-61.

⁶³ AC Judgment, para. 59.

⁶⁴ Comoros Judicial Review, paras. 37-45.

⁶⁵ PTC First Decision requesting Reconsideration, para. 23.

ships surrounding the Flotilla, which were commanded by senior officials in the Israeli Navy⁶⁶, and reports from Victims who witnessed a senior member of the IDF board the Mavi Marmara shortly after the IDF took control of the ship.⁶⁷

27. The Victims have repeatedly offered to be interviewed by the OTP to answer all questions which might assist with any inquiries and with a potential investigation. This offer has never been accepted and or even responded to by the Prosecutor. Relevant information could have been gathered. For instance, in one Victim's recent observations, potential sources were identified which could point to the criminal responsibility of senior military officials and political leaders, namely, "*statements such as the Israeli foreign minister at the time for example stating they are willing to stop the flotilla at any cost, a video issued by the Israeli military summarizing their preparations prior to the attack, and an interview with the Israeli ambassador to the US at the time on NPR radio who stated that the largest ship 'was simply too large to stop by non-violent means but the other ships were not.'*"⁶⁸ These sources alone are relevant to the criminal responsibility of individuals at the highest level – a factor clearly affecting the gravity analysis – and show that the Prosecutor would be able to investigate those most responsible if an investigation was opened.
28. The Victims note that similar public documents were submitted by the Comoros to the Prosecutor which set out how the operations against the Flotilla were planned and coordinated by senior officials – clearly indicating that responsibility for the attack could extend to high ranking leaders and officials in Israel.⁶⁹ Yet, these documents

⁶⁶ See, Public Commission to Examine the Maritime Incident of 31 May 2010, The Turkel Commission, January 2010 ("Turkel Report"), pg 129, stating "[f]rom the viewpoint of deploying the forces for the naval stage of the operation, it was decided that the command level would be very senior, including the Commander of the Navy himself." See also, note 450 on pg 129 stating "As part of the presentation of the operation's principles to the Chief of Staff prior to the operation, the Chief of Staff determined that the commander of the Navy is the commander of the operation. ... In addition, in Operations and Excursions summary of May 13, 2010, para E, sub para.4 it is mentioned that 'The Chief of Staff stressed the importance of senior command's presence at the anticipated points of friction while conducting a sensitive and measured action – responsibility of the commander of the Navy.'"

⁶⁷ Victim Observations pursuant to "Decision on Victims' Participation" of 24 April 2015, ICC-01/13-28-Red, 22 June 2015, para. 30 [hereinafter "Victim Observations of April 2015"].

⁶⁸ Victim a/05092/14.

⁶⁹ See, The Public Commission for Examining the Naval Incident of 31 May 2010 (The Turkel Commission) Session Number Three, On 10.08.2010 in which Defense Minister, at the time of the attack, Ehud Barak gave testimony that "*I held a discussion in my office and one again the topic of the Turkish flotilla arose, and here the main idea to be implemented was presented. Present were the Chief of Staff, the head of military intelligence, the commander of the navy, the head of the operations branch, the representative of the Foreign Ministry, and many other participants. In that session I gave directions to involve additional bodies*

were wrongly disregarded as irrelevant, when it is clear that they speak directly to the ability of the Prosecutor to investigate those most responsible if an investigation were to be opened.

29. It was therefore a clear error for the Prosecutor to disregard this evidence, and the evidence which could be provided through public sources and the evidence of the Victims, when the Prosecutor's ability to investigate those most responsible would plainly heighten the gravity of the potential cases.

The Prosecutor erred in assessing the scale of the crimes

30. The Victims submit that the Prosecutor has failed to correct the errors concerning the scale of crimes identified by the Pre-Trial Chamber in its 16 July 2015 decision. The Prosecutor has also made new errors which necessitate correction.
31. The Victims highlight the Comoros's submission that the Prosecutor's "*appreciation of the scale of the identified crimes*" does not "*conform to the direction of the majority*",⁷⁰ given that the Prosecution has omitted evidence of torture and inhumane treatment for its consideration of gravity.⁷¹ The Victims submit that the Prosecutor has thus failed genuinely to reconsider her decision not to investigate in accordance with the Pre-Trial Chamber's decision of 16 July 2015.

in the diplomatic campaign to prevent the flotilla, I guided the IDF to make a status evaluation with regards to examining the option of interdicting the departure of the flotilla or reducing it in terms of the means, the regions, the timing and the methods which I cannot go into detail here. In this discussion comments were made both by me and by others, with regards to examining extreme situations and extreme scenarios, and the parties responsible for the action were requested to pay attention to such situations" and "As Defense Minister, I bear a comprehensive responsibility for everything that took place in the systems subordinate to me, including the IDF. I take full responsibility as Defense Minister, for the directives of the political echelon, to the military echelon, as they were given also on the subject of the flotilla." See also, The Public Commission to Examine the Maritime Event of the 31st of May 2010, Meeting number 2 of the 9th of August 2010 in which Prime Minister, Benjamin Netanyahu gave testimony before the Turkel Committee stating "I left clear instructions of who was responsible for handling all aspects of the flotilla, we expected not only the action, the IDF's action to stop the ship, we also expected the entire international problem, and I requested the Minister of Defense, to coordinate this matter, to activate the "Forum of Seven" if necessary, and to contact me abroad, if necessary, but I wanted there to be a clear address on the ground for coordinating all of the issues, the political issues and the public relations issues, of course is additional responsibility vis-à-vis the army was clear by virtue of his position as the Minister of Defense. I wanted there to be one person, and indeed there was." See also, Public Commission to Examine the Maritime Incident of May, 31, 2010 Session Number 4, on the date of 8.11.2010, The Turkel Commission which contains the witness testimony of IDF Chief of Staff at the time of the attack, Gabi Ashkenazi, before the Turkel Committee.

⁷⁰ OTP Second Reconsideration Decision, 30-31.

⁷¹ See, Comoros Judicial Review, para. 48.

32. The Prosecutor’s fixed position that the available evidence “*does not indicate that the treatment inflicted on the affected passengers amounted to torture or inhumane treatment*” is plainly premature at this very early stage of the proceedings.⁷² The Prosecutor’s latest decision failed to apply the correct legal standard as adopted by the Pre-Trial Chamber. When, as in this case, the Prosecutor is presented with evidence that the level of pain and suffering the Victims experienced could amount to torture and inhumane treatment, an investigation should be opened to inquire into this evidence (even if there is an alternative interpretation that the evidence may be insufficient to amount to torture). It is erroneous to pick one interpretation over another at this stage.⁷³
33. The Prosecutor has been presented with more than sufficient evidence that the mistreatment of the Victims of the attack by the IDF rose to the level of torture such that, at a minimum, the Prosecutor should open an investigation to examine these allegations further. The Prosecutor has been provided with evidence, for example, of gunshot wounds to dozens of Victims,⁷⁴ severe and brutal beatings of passengers,⁷⁵ overly tight handcuffs,⁷⁶ and the use of prolonged stress positions⁷⁷ which cannot be ignored. Much of this evidence comes directly from the accounts of the Victims.
34. The Pre-Trial Chamber found that the Prosecutor had erred in not taking into account “*compelling indicators of sufficient, and not of insufficient gravity*” such as that “*ten*

⁷² Notice of filing the report prepared by the Office of the Prosecutor pursuant to article 53(1) of the Rome Statute, Annex A – Article 53(1) Report, ICC-01/13-6-AnxA, 6 November 2014, para. 139 [*hereinafter* “OTP Article 53(1) Report”].

⁷³ See, Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation, ICC-01/13-34, 16 July 2015, para. 13 [*hereinafter* “PTC First Decision requesting Reconsideration”].

⁷⁴ See, for example, Victim Observations of April 2015, para. 42, note 72, 91. See also, Victims’ Response to the Application for Judicial Review by the Government of the Comoros filed pursuant to the Pre-Trial Chamber’s “Decision on the Request for an Extension of Time” of 2 March 2018, ICC-01/13-66, 3 April 2018, paras. 12, 61, 63, 64, 69.

⁷⁵ See, for example, Victim Observations of April 2015, para. 42, note 91. See also, Victims’ Response to the Application for Judicial Review by the Government of the Comoros filed pursuant to the Pre-Trial Chamber’s “Decision on the Request for an Extension of Time” of 2 March 2018, ICC-01/13-66, 3 April 2018, para. 69.

⁷⁶ See, for example, Victim Observations of April 2015, para. 42, note 91.

⁷⁷ See, for example, Application for Judicial Review by the Government of the Union of the Comoros, ICC-01/13-58-Red, 23 February 2018, paras. 18, 108. See also, Victim Observations of April 2015, para. 42, note 91; and Victims’ Response to the Application for Judicial Review by the Government of the Comoros filed pursuant to the Pre-Trial Chamber’s “Decision on the Request for an Extension of Time” of 2 March 2018, ICC-01/13-66, 3 April 2018, paras. 12, 61, 63, 64, 69.

*killings, 50-55 injuries, and possibly hundreds of instances of outrages upon personal dignity, or torture or inhuman treatment” had occurred.*⁷⁸ The Prosecutor’s omission of evidence which indicates that torture and inhumane treatment occurred therefore demonstrates that she failed genuinely to reconsider her decision in accordance with the Pre-Trial Chamber’s findings, as directed by the Appeal Chamber.⁷⁹ It is also contrary to the Appeals Chamber’s finding that the *“Prosecutor cannot ignore a request to the pre-trial chamber to take into account certain available information when determining whether there is a sufficient factual basis to initiate an investigation.”*⁸⁰

35. Victims whose treatment during the attack caused them severe pain and suffering have expressed their disbelief that the Prosecutor would disregard their experiences, and seek to degrade them as not being grave enough to even investigate them further to *“properly assess the relevant facts.”*⁸¹ For example, one Victim lamented that *“If killing civilians will not be investigated in the international arena, perhaps we do not need ICC in the first place. There was a massacre in the convoy, hundreds of people were humiliated and subjected to torture and ill-treatment.”*⁸²
36. Having been repeatedly notified that the Victims are willing to be interviewed by the OTP, it is manifestly premature for the Prosecutor to make a determination on the severity of the Victims’ pain and suffering without opening an investigation and interviewing the Victims first. Indeed, as pointed out by several Victims in their recent responses to the Prosecutor’s latest decision:
- *“You cannot understand how we felt that night without being in our place. We witnessed that the wounded hands were kept handcuffed for hours, and women and the elderly moaned for hours. Our friends were killed before our eyes.”*⁸³
 - *“People had to be there that day to understand us.”*⁸⁴

⁷⁸ PTC First Decision request Reconsideration, para. 26.

⁷⁹ Judgment on the appeal of the Prosecutor against Pre-Trial Chamber I’s ‘Decision on the ‘Application for Judicial Review by the Government of the Union of the Comoros’, ICC-01/13-98, 2 September 2019, para. 96 [*hereinafter* AC Judgment].

⁸⁰ AC Judgment, para. 80.

⁸¹ PTC First Decision requesting Reconsideration, para. 13.

⁸² Victim a/15210/15.

⁸³ Victim a/40022/13.

⁸⁴ Victim a/40130/13.

- *“It is not possible for a person who has not experienced similar violations to fully understand the traumatic situation we are experiencing.”*⁸⁵

37. Without opening an investigation, and asking the Victims directly about the severity of their pain and suffering, the Prosecutor is simply making a pre-judgment *“in the presence of several plausible explanations of the available information.”*⁸⁶

38. The Victims also dispute the Prosecutor’s statement that *“it is not necessarily true that any potential case arising from this situation will encompass all the victimisation which has been identified in the situation as a whole”*,⁸⁷ as an attempt to diminish the scale of the attack by dividing up the Situation and claiming that each potential case might not be grave enough. Not only does this erroneous assertion contradict the Pre-Trial Chamber’s instruction that all identified crimes should be considered as a whole for the gravity assessment, but it is also in contravention of the Appeals Chamber’s recent finding in the *Al Hassan* case concerning the consideration of contextual elements for the purpose of the gravity assessment.

39. Even if the Prosecution were to assess each potential case individually for the purpose of its recent gravity decision (a proposition the Victims find nonsensical and completely hypothetical considering that the Prosecution has not taken any steps to identify any potential perpetrators, and must consider the *“context of the crimes and the overall allegations”* to define the parameters of the case),⁸⁸ the Appeals Chamber has made clear that *“[a]n evaluation of the factual allegations underpinning the contextual elements of the charged crimes”* is relevant to the gravity determination.⁸⁹ Therefore, the Prosecution would still have to take into consideration all factual allegations and ‘all the victimisation’ as contextual elements, even if it were to seek to only evaluate potential cases individually for gravity. They could not be considered in isolation in a void. The Prosecution’s assertion that the scale of the identified

⁸⁵ Victim a/05061/14.

⁸⁶ PTC First Decision requesting Reconsideration, para. 13.

⁸⁷ OTP Second Reconsideration Decision, para. 34.

⁸⁸ Prosecutor v Al Hassan, Judgment on the appeal of Mr Al Hassan against the decision of the Pre-Trial Chamber I entitle ‘Décision relative à l’exception d’irrecevabilité pour insuffisance de gravité de l’affaire soulevée par la défense’, ICC-01/12-01/18-601-Red, 19 February 2020, para. 65 [*hereinafter* “Al Hassan AC Decision”].

⁸⁹ Al Hassan AC Decision, para. 69.

crimes does not weigh in favour of a finding of sufficient gravity if it were to examine hypothetical cases individually, should be firmly rejected.

40. In addition, it is submitted that the Prosecutor erred in not properly taking the scale of victimisation into account as a factor in the gravity analysis. It is noted that the *Al Hassan* Appeals Chamber Decision rightly examined “*the facts underlying the alleged crimes*”, including that the scale of the victimisation and the alleged crimes included, “*at least 10 direct victims of forced marriage, sexual slavery and rape, 22 direct victims of torture and other ill treatment, 60 direct victims of the passing of sentences with due process, and destruction of ten protected building.*”⁹⁰
41. In the present Situation the Victims emphasise that the number of Victims affected and alleged crimes include “*ten killings, 50-55 injuries, and possibly hundreds of instances of outrages upon personal dignity, or torture or inhumane treatment*”⁹¹ – these figures exceed those of the underlying context of the *Al Hassan* case, which has been found to be sufficiently grave for prosecution before the Court.
42. In addition, the Victims submit that the Prosecutor has erred by not recognising that the large number of victims in this Situation is a factor that weighs in favour of sufficient gravity. Again, the Victims refer to the Appeals Chamber’s recent decision concerning the gravity of the *Al Hassan* case. It is noted that the Appeals Chamber confirmed that “*the number of victims is a relevant consideration in the assessment of the gravity*” of a case, and that “*the number of participating victims may provide some indication of the scope of victimhood.*”⁹²
43. In the *Al Hassan* case, the Appeals Chamber noted that the 882 victims registered to participate is a “*large number of victims.*”⁹³ In the present Situation, the Legal Representatives for Victims act on behalf of 378 registered Victims, and OPCV represents nearly 100 further Victims, meaning that the number of victims registered to participate in these proceedings is close to 500.

⁹⁰Al Hassan AC Decision, para. 101.

⁹¹ PTC First Decision requesting Reconsideration, para. 26.

⁹²Al Hassan AC Decision, para. 97.

⁹³Al Hassan AC Decision, para. 98.

44. It should also be taken into account that only victims who were passengers of the three vessels which were flying the flag of an ICC member state – the Mavi Marmara, the Rachel Corrie and the Eleftheri Mesogios/Sofia – have been allowed to participate as victims.⁹⁴ This means that the number of victims of the attack as a whole is actually much higher, considering that there were over 700 passengers on all six of the vessels of the Flotilla which were attacked. This factor and wider context is critical to the gravity analysis, but the Prosecutor failed to take it into consideration. Therefore, it is submitted that the number of victims registered to participate in the present Situation is comparable, and should also rightly be considered to be a “*large number of victims*”.
45. Last, the Victims agree with the Comoros’ submission⁹⁵ concerning the Prosecutor’s insistence that the Victims were not “*humanitarian assistance workers within the meaning of article 8(2)(b)(iii)*”.⁹⁶ The Victims however submit that the “*civilians attacked in this incident are also human rights defenders*”⁹⁷ and that the “[f]ailure to open an investigation about the attack on people who set out for charity will discourage the people who carry out these activities.”⁹⁸
46. Even more fundamentally, in their responses to the Prosecutor’s recent decision, the Victims stressed that they were unarmed civilians attacked with concerted military force. For example, one victim stated that “*I believe the crimes were grave enough to be before the ICC because a military operation was ordered against civilians resulting in deaths and injury. Live ammunition was sanctioned and used against civilians.*”⁹⁹
47. For the Victims, they cannot understand why their status as civilians attacked by a military force does not affect the gravity assessment for the Prosecutor. The Victims expressed frustration that the Prosecutor seemed to view their lives as insignificant,

⁹⁴ See, Report on Applications Received from Victims who have Communicated with the Court pursuant to Decision ICC-01/13-18, ICC-01/13-21, 8 May 2015, para. 9.

⁹⁵ Comoros Judicial Review, paras. 55, 56.

⁹⁶ OTP Second Reconsideration Decision, para. 36.

⁹⁷ Victim a/40006/13.

⁹⁸ Victim a/40094/13.

⁹⁹ Victim a/40006/13.

saying “*Our lives should not be so cheap*”¹⁰⁰ and “*Human life, honor and dignity should not be so cheap.*”¹⁰¹ One Victim stressed that “[t]here are children who lost their fathers that night, and parents who lost their children. Therefore, I think that when we make a sentence on this event, we need to talk and act without forgetting that this event is a knot in someone's throat.”¹⁰²

48. It was plainly an error for the Prosecutor not to find that the Victims’ status as civilians, and as humanitarian and human rights defenders, affected the gravity analysis, and this error should be corrected.
49. For all of these reasons, the Victims submit that the Prosecutor continues to err in her assessment of the scale of the crimes for the purpose of the gravity assessment by failing genuinely to reconsider her decision in accordance with the Pre-Trial Chamber’s decision of 16 July 2015, and by committing new errors. These errors must be rectified.

The Prosecutor erred in assessing the nature of the crimes

50. The Victims submit that the Prosecutor has again erred by disregarding evidence indicating that the treatment and abuses committed against passengers of the Flotilla amounted to torture or inhuman treatment, and not only outrages upon human dignity. This error affected the scale of the crimes as well as the nature of the crimes.
51. As explained above, the Prosecutor has been provided with evidence which indicates the severity of the pain and suffering experienced by the Victims. It should, at a minimum, justify a finding that torture or inhuman treatment could have occurred and that further investigation is needed to properly assess the facts. The Victims submit that the Prosecutor’s failure to implement the Chamber’s interpretation of the correct legal standard for determining whether to open an investigation significantly impacted the gravity analysis. Had the Prosecutor recognised that the commission of torture and inhumane treatment was one of “*several plausible explanations of the available information*”, it would have elevated the gravity of the situation.

¹⁰⁰ Victim a/05052/14.

¹⁰¹ Victim a/40130/13.

¹⁰² Victim a/15009/15.

52. Instead, the Prosecutor has misused and misapplied the Appeals Chamber’s finding that the Pre-Trial Chamber cannot direct the Prosecutor on “*what factual findings she should reach and what weight she should assign*”.¹⁰³ The Prosecutor wrongly relies on this finding to conclude that “*no weight necessarily attaches*” to the evidence consistent with torture and inhumane treatment.¹⁰⁴ This is a perverse outcome, particularly in light of the overwhelming evidence from the Victims of torture, which is indicative of the severity and gravity of the alleged conduct.
53. The Prosecutor’s submission that it “*only accords neutral significance to the legal characterisation of the identified conduct, but gives weight instead to the factual nature of the identified crime*” is an ill-conceived attempt to argue that there should be no difference in the gravity assigned between an action that is legally characterised as torture and another action that is legally characterised as an outrage upon personal dignity.¹⁰⁵ This is a wholly irrational conclusion. The underlying conduct by definition must be severe to amount to torture which consequently increases the gravity of the case.
54. For these reasons, the Victims submit that the Prosecutor has again failed to reconsider her decision in accordance with the Pre-Trial Chamber’s decision. The Prosecutor has incorrectly and prematurely adopted one explanation of the available information to close the Preliminary Examination, when the proper course would have been to open an investigation to examine the crimes committed. By committing this error the Prosecutor has wrongly sought to avoid assigning weight to the fact that one plausible explanation of the evidence is that the Victims were tortured and treated inhumanely, which underlines the gravity of the case.

¹⁰³ AC Judgment, paras. 92, 94.

¹⁰⁴ OTP Second Reconsideration Decision, para. 42.

¹⁰⁵ See, OTP Second Reconsideration Decision, para. 43.

The Prosecutor erred in assessing the impact of the crimes

55. The Victims submit that the Prosecutor has again erred by continuing to disregard the “*significant impact of such crimes on the lives of the victims and their families.*”¹⁰⁶ The Victims emphasise that the Pre-Trial Chamber’s decision of 16 July 2015 clearly set out that the “*physical psychological or emotional harm suffered by the direct and indirect victims of the identified crimes must not be undervalued and needs not be complemented by a more general impact of these crimes beyond that suffered by the victims.*”¹⁰⁷
56. It is misplaced for the Prosecutor to claim that her “*margin of appreciation*” justifies not addressing anywhere in her latest decision her assessment of the impact of the crimes on the Victims. No explanation is given on how this very important consideration was analysed and how the Prosecutor’s analysis might have changed from her previous consideration which the Pre-Trial Chamber found to be in error.
57. The Victims highlight that the Prosecutor was provided with the Victim applications and statements of all 378 victims represented by the Legal Representatives so that the Prosecutor had access to the Victims’ full accounts of how the crimes committed affected them physically and emotionally. The Victims gave numerous examples of the far-reaching ways that the attack impacted both their lives and the lives of their families, but also how this impact continued long after they had returned home.¹⁰⁸
58. When submitting their views and concerns about the Prosecutor’s latest decision not to investigate, many Victims emphasised how the pain and suffering they experienced as a result of the attack has never ended. For example, in setting out the long-term effects of the attack that they still suffer ten years after the attack, Victims stated that:

- “*[D]ue to my treatment by the Israeli military, I was diagnosed with Post Traumatic Stress Disorder ... which involves nightmares, flashbacks and serious depression.*” *The city where I live “requires frequently traveling aboard ferries, similar to the Mavi Marmara. These trips inevitably lead to flashbacks of dead bodies, blood smeared walls and floors and Israeli soldiers putting guns to my head, threatening and abusing myself and others. Even*

¹⁰⁶ PTC First Decision requesting Reconsideration, para. 47.

¹⁰⁷ PTC First Decision requesting Reconsideration, para. 47.

¹⁰⁸ See Victims accounts set out in Comoros Judicial Review, para. 68.

the rather mundane daily issue of needing to find a bathroom today, will often bring back memories of the Israeli soldiers needlessly and cruelly preventing myself, and everyone else captured on the Mavi Marmara, from using a washroom. The feelings of humiliation and powerlessness will never leave me.”¹⁰⁹

- *“The psychological effects of the attack I am experiencing still continue. Two of my friends were killed before my eyes. It is very difficult to forget this scene and continue my life as before.”¹¹⁰*
- *“My mental health has deteriorated due to the ill-treatment I have experienced. My family was also affected by this attack. One of the things that gave me and my family morale during these difficult days was that justice would be provided one day.”¹¹¹*
- *“We could never forget what we experienced. Our relatives were also affected by the mental troubles we experienced. We sometimes faced discrimination due to the political nature of this event.”¹¹²*
- *“After the incident, my wife had not heard from me and thought that I was killed. The scars of the psychological crisis from that time still continues both for me and my wife.”¹¹³*
- *“My family suffered great problems during my stay in intensive care after the incidents. Those days are now over but I'm still experiencing the traces of the great trauma I have experienced. Especially the extreme fear and panic situation that I experienced during the attack sometimes comes to light.”¹¹⁴*
- *“My recovery time was very wearing and tiring. It took me a really long time to get both myself and my family together. I was shot in my leg and foot. It wasn't an easy thing to go through.”¹¹⁵*
- *“Two of my friends were murdered before my eyes. We were face to face with death. It is not possible to forget some scenes. The fear and panic situation I experienced still continues. I'm still startled when I hear the sound of aircraft or helicopters.”¹¹⁶*

59. The Victims submit that the Prosecutor has clearly erred in disregarding the significant impact the crimes had on the lives and well-being of the Victims and their

¹⁰⁹ Victim a/40004/13.

¹¹⁰ Victim a/15161/15.

¹¹¹ Victim a/40035/13.

¹¹² Victim a/40087/13.

¹¹³ Victim a/15134/15.

¹¹⁴ Victim a/15037/15.

¹¹⁵ Victim a/40029/13.

¹¹⁶ Victim a/15004/15.

families by effectively ignoring the countless victim statements and evidence provided on this point.

60. The Victims are truly dismayed that the Prosecutor continues to act as though the physical and psychological pain and suffering that the Victims and their families experienced, and continue to experience in 2020 – ten years after the attack – does not indicate sufficient gravity to investigate their cases. The Pre-Trial Chamber has made clear that evidence about the impact on the Victims alone “*must not be undervalued*”, as the Prosecution has done. This error must be corrected.
61. In addition, with regard to the evidence that the crimes “*had an impact going beyond the suffering of the direct and indirect victims*”, the Prosecutor again failed genuinely to reconsider her decision in accordance with the instructions in the Pre-Trial Chamber’s 16 July 2017 decision.¹¹⁷ In its decision, the Pre-Trial Chamber found that such evidence shows that the events “*would have sent a clear and strong message to the people in Gaza (and beyond)*” – evidence that would indicate the impact of the crimes had a wider reach and therefore should affect the gravity analysis – and that the Prosecutor was therefore in error for ignoring this evidence.¹¹⁸
62. Importantly, the Appeals Chamber has confirmed that the “*Prosecutor cannot ignore a request to the pre-trial chamber to take into account certain available information when determining whether there is a sufficient factual basis to initiate an investigation*”.¹¹⁹ But the Prosecutor has done exactly that by refusing to take evidence of the wider impact into account for the gravity analysis, incorrectly using the excuse that the OTP cannot entertain the ‘moral and political’ impact of the crimes because it is in not position to assess the symbolic importance of the crimes.¹²⁰
63. There is no merit in the Prosecutor’s explanation that she cannot take evidence of the wider impact of the crimes into account. It amounts to a blatant attempt to evade the obvious fact that such evidence is relevant to the gravity of the crimes. The multiple international investigations and reports into the incident alone reflect the impact the

¹¹⁷ PTC First Decision requesting Reconsideration, para. 48.

¹¹⁸ PTC First Decision requesting Reconsideration, para. 48.

¹¹⁹ AC Judgment, para. 80.

¹²⁰ OTP Second Reconsideration Decision, para. 49.

event had more widely on the international community.¹²¹ As for the impact of the crimes on the community in Gaza and the Occupied Palestinian Territories as well as on all humanitarian workers and human rights advocates following the events, the Victims have provided clear evidence for the OTP to take into consideration. Not only are some Victims residents and citizens of Israel and Palestine, and able to speak about way the attack affected these communities, but the majority of passengers of the Flotilla work in the field of humanitarian assistance and human rights advocacy. This information and evidence should all have been taken into account by the OTP as being relevant to the gravity assessment.

64. Last, the Victims respond to the Prosecutor's attempt to minimise the impact of the crimes by using their efforts to exhaust domestic remedies against them. The Victims submit that this claim by the Prosecutor is not only fundamentally unfair, but factually inaccurate.

65. With respect to the inaccuracies about the status of the domestic proceedings, the Victims echo and support the corrections set out in the Comoros Judicial Review application.¹²² The Victims submit that the Prosecutor's assertion contradicts the Court's core principle of complementarity, and is in opposition to the object and purpose of the ICC as a court of last resort.¹²³ As submitted by one Victim:

- *"I have taken part in legal action in Turkey alongside my fellow international passengers. Our case was ended by a unilateral political agreement, without consideration of the wishes of the victims, without consideration for victims from countries other than Turkey. In the UK, after 10 years, I still have not been interviewed by any national legal authority."*¹²⁴

¹²¹ See, Report of the international fact-finding mission to investigate violations of international law, including international humanitarian and human rights law, resulting from the Israeli attacks on the flotilla of ships carrying humanitarian assistance, UN Human Rights Council, A/HRC/15/21, 27 September 2010 ("UNHRC Report"); Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident, September 2011 ("Palmer Report"); Report on the Israeli Attack on the Humanitarian Aid Convoy to Gaza on 31 May 2010, Turkish National Commission of Inquiry, February 2011; Public Commission to Examine the Maritime Incident of 31 May 2010, The Turkel Commission, January 2010 ("Turkel Report").

¹²² Comoros Judicial Review, paras. 77, 78.

¹²³ See, <https://www.icc-cpi.int/about>.

¹²⁴ Victim a/40006/13. In addition, Victim a/40035/13 stated that "[W]e tried to give our struggle for human rights in the judicial bodies in Turkey. But we still could not get a definitive result"; and Victim a/05011/14 stated that "My search for rights in my own country has been going on for about ten years, but I did not get a clear result."

66. No Victim should be punished, or have their pain and suffering diminished, for seeking to find justice in their home jurisdiction. In fact, a reasonable and empathetic prosecutor would have understood that having the case in a domestic jurisdiction halted (for wholly unjustified reasons), would only cause further frustration and distress, and further aggravate the suffering of the Victims.

The Prosecutor erred in assessing the manner of commission of the crimes

67. The Victims submit that the Prosecutor has failed to correct the errors identified by the Pre-Trial Chamber in respect of the following considerations regarding the manner of the commission of the crimes, and she should be directed to address and rectify each of these errors.

a. Use of live fire by the IDF prior to boarding

68. On the issue of live fire by the IDF prior to boarding, the Prosecutor has again failed to take into account that there is clear evidence which supports the conclusion that the IDF fired live ammunition at the civilian passengers of the Mavi Marmara before any soldier had boarded the ship. The Prosecutor has therefore not considered how this evidence affects the gravity assessment. This is a grave error as the evidence is consistent with a plan and intention to attack and kill civilians on the ship, which aggravates the seriousness of the alleged crimes.

69. The Prosecutor has again disregarded the evidence of the Victims who witnessed live fire before any boarding on the Mavi Marmara¹²⁵ It is objectionable that at this early stage the Prosecutor again seeks to discredit their accounts as not being credible and believable.¹²⁶ Discounting the accounts of Victims in this way before any investigation has been conducted and without having interviewed the Victims, disregards the clear instruction from the Chamber that “*conflicting accounts are not valid reasons not to start an investigation but rather call for the opening of such an investigation*” and the “*purpose of an investigation is to provide clarity.*”¹²⁷

¹²⁵ See, PTC First Decision requesting Reconsideration, para. 29.

¹²⁶ OTP Second Reconsideration Decision, para. 70, note 114.

¹²⁷ PTC First Decision requesting Reconsideration, para. 13.

70. The Prosecutor is willfully disobeying the Chamber's decision of 16 July 2015, and ignoring critical information which is clearly relevant to the gravity assessment. It is essential that this error is corrected.

71. The Victims recall the live fire they witnessed before any soldiers were on the ship as an event that symbolises the gravity of the crimes committed. For example, in their responses to the Prosecutor's latest decision, Victims highlighted the seriousness of what they experienced by stating that:

- *The IDF "started shooting from helicopter before landing on board."*¹²⁸
- *"They fired on us from the helicopter, threw gas bombs, sound bombs."*¹²⁹
- *"They fired with real bullets while landing on the ship. This fire was a deadly fire that directly targeted civilians on the ship."*¹³⁰

72. The Prosecutor only goes so far as accepting the presence of evidence that live rounds were fired before the second attempt at boarding; an admission that still allows the Prosecutor to maintain that the live fire was only used in self defence against the "violent resistance" of certain Mavi Marmara passengers.¹³¹ The Victims emphasise that there has never been any agreement about the Prosecutor's list of "factual considerations"; including that the war crime of murder was "*committed in the context of violent resistance against the IDF boarders; that the IDF acted reasonably in seeking to board the ship by surprise; and that the IDF used none lethal weapons and a graduated approach to the use of force.*"¹³² The Victims unequivocally deny ever conceding that any of these points were not in dispute. Instead, the Victims' consistent position is that the evidence demonstrates that the IDF intended to attack the civilians on the vessel with the intention to kill passengers or with disregard for the outcome.

¹²⁸ Victim a/15037/15.

¹²⁹ Victim a/40022/13.

¹³⁰ Victim a/15041/15.

¹³¹ OTP Second Reconsideration Decision, para. 65.

¹³² Comoros Judicial Review, para. 87 paraphrasing OTP Second Reconsideration Decision, para. 65.

73. The Victims submit that the Prosecutor’s arguments demonstrate that she seeks to adopt only versions of the evidence that mitigate the IDF’s liability – a truly bizarre position to adopt at this early stage of the proceedings. No reasonable prosecutor would reach such a conclusion in a Preliminary Examination. It constitutes a clear error that must be rectified. Each of these ‘factual considerations’ are open to interpretations which are disputed. The Prosecutor erred in adopting one particular version of the facts – the version consistent with assigning the least gravity to the case. She should have recognised that these factual disputes need to be considered in the context of an investigation.

b. Cruel and abusive treatment of detained passengers in Israel

74. Despite the Chamber identifying that the Prosecutor failed to consider relevant information about abuses committed in Israel for the gravity analysis, and making clear that the Prosecutor must take this information into account, the Prosecutor has stubbornly pronounced that she “*has not sought to apply*” the correct legal standard as interpreted by the Pre-Trial Chamber to this evidence. This is contrary to the Appeals Chamber’s finding that the Prosecutor cannot unilaterally decide when to follow and not follow the legal decisions of the Chamber.¹³³

75. Further, the Appeals Chamber’s recent decision in the *Al Hassan* case found that factual allegations with regard to the contextual elements of the crimes are relevant to an assessment on gravity.¹³⁴ This finding underscores that it is an error for the Prosecutor not to apply the Pre-Trial Chamber’s legal standard. The Prosecutor has erred in disregarding the aggravating contextual evidence about the abuses and cruelty the Victims faced in Israel which would heighten the gravity of the situation.

76. It is understandable that Victims have concluded that “*this latest episode with the Prosecution’s office is indicative that (a) the Prosecutor can continue to act with impunity against the decisions of the various ICC bodies, and (b) there does not seem to be any checks and balances in place to prevent this and/or rectify it.*”¹³⁵

¹³³ AC Judgment, paras. 77, 78.

¹³⁴ Al Hassan AC Decision, para. 69.

¹³⁵ Victim a/05092/14.

c. Unnecessarily cruel treatment of passengers during the taking of the Mavi Marmara and attempt to conceal the crimes

77. The Victims support the submission that the Prosecutor failed to correct the error identified by the Chamber that the OTP disregarded evidence of unnecessarily cruel treatment of passengers, which is important to considering the manner of the commission of the crimes for the gravity analysis.¹³⁶ The Prosecutor simply failed in any way to acknowledge or address this error in her latest decision.
78. The Victims are astounded that the Prosecutor continues to ignore evidence which clearly highlights the egregious manner in which the IDF committed the alleged crimes – evidence which increases the gravity of the situation. The Victims’ disbelief has led one Victim to state: “*Should we be killed to be taken more seriously?*”¹³⁷
79. The Prosecutor also erred in respect of the evidence about the IDF concealing their crimes. The OTP acknowledges that this evidence could be interpreted as supporting the existence of a plan or policy – which would undoubtedly heighten the gravity of the situation – but then decides that no significance or weight can be attached to this evidence for the purposes of the gravity assessment. The Victims submit that this reasoning and conclusion are irrational. The Prosecution is using a ‘backdoor’ to avoid implementing the Chamber’s decision. The Prosecutor is claiming that she is taking evidence consistent with gravity into account, but then simply assigning it no weight so that she need not change her decision. This is completely unsustainable. The Prosecutor must be directed to correct this error.

d. Absence of crimes on the other vessels of the flotilla

80. The Prosecutor has also failed to address the errors identified by the Pre-Trial Chamber concerning evidence of crimes on the other vessels. To simply not address an error which the Chamber directed the Prosecutor to correct, is an error in itself.

¹³⁶ See, PTC First Decision requesting Reconsideration, para. 41.

¹³⁷ Victim a/05022/14.

81. The Victims submit that this evidence is critical to the gravity analysis because it demonstrates the intent of the IDF to injure, abuse and kill the civilians on all the vessels of the Flotilla – thus removing the professed explanation that the IDF only reacted to an alleged violent resistance on the Mavi Marmara but were able to peacefully control the other vessels. The Victims thus emphasise that this evidence must be taken into account in the gravity analysis, and cannot be disregarded.
82. Some of the Victims who have responded to the OTP’s latest decision were passengers on the other ships. They have described how serious the abuse was that they suffered on the other vessels and how it continues to affect them today. One Victim, for example, stated that *“I was one of the persons assaulted by Israeli forces on one of the five other boats. I continue to have recurring psychological trauma from the events of the Israeli attack.”*¹³⁸ Even the captain of the Gazze I communicated the extent of the abuse he suffered as a result of the attack, stating that:

- *“I still have not been able to overcome the psychological effects of the incident. As a result of the mental problems and the process I experienced after the incident, my marriage ended. This painful incident has been a turning point in my life that led me to the bottom ... I have experienced things that cannot be compensated, both materially and spiritually.”*¹³⁹

83. These responses underline the severity of the abuse that Victims suffered on the other vessels, and the importance of not allowing the Prosecutor to ignore and not include the evidence of these crimes in the gravity analysis.

III. THE GUARANTEES NECESSARY FOR COMPLIANCE

84. The Victims reiterate that the continuous delays in the proceedings are undermining their ability to obtain justice before the ICC. The Victims are keenly aware of the tenth anniversary of the attack on the Flotilla later this month, and of the seven years of litigation before this Court in trying to progress the proceeding merely to the investigative stage.

¹³⁸ Victim a/05089/14.

¹³⁹ Victim a/15210/15.

85. As noted above, the responses of the Victims to the Prosecutor’s latest decision overwhelmingly convey the impact that these delays have had on their lives and their families’ lives, their ability to move on from their experiences and their faith in the law. Victims stated, for example, that:

- *“The delays in opening an investigation before the ICC have been far too long, It has been ten years that we have been seeking justice. I try to live my life but the images of what happened on Mavi Marmara, and the fact that those responsible have not been held accountable for their crimes, is sometimes too much, not just for me, but for all of us who survived the attack.”¹⁴⁰*
- *“10 years have passed. It is very difficult to wait for 10 years without giving up our hope on justice. The hardest thing in this life is to wait with your hands tied. ... The only thing that will wake us from this nightmare will be a fair trial.”¹⁴¹*

86. The Victims are dismayed that the Prosecutor appears to have no intention of ever opening an investigation and will continue to flout the Pre-Trial Chamber’s decision. As one Victim stated, there is a feeling that *“the Prosecutor just wishes [the Victims] would be quiet and go away.”¹⁴²*

1. Errors of fact must be addressed and corrected

87. It is thus vital that the Chamber make clear to the OTP *“that errors of fact – including the OTP reaching a factual conclusion that no reasonable person could reach or failing to take proper account of relevant evidence, which the OTP has itself recognised are errors of fact – are errors that must be addressed and corrected like any error of law.”¹⁴³*

88. The need for such an instruction is shown, for example, above with regard to the Prosecutor’s treatment of evidence of the IDF concealing their crimes. The Prosecutor acknowledges the importance of this evidence to a potential plan or policy and to the intent of those in charge, but then steadfastly refuses to afford the evidence any

¹⁴⁰ Victim a/05075/14.

¹⁴¹ Victim a/40060/13.

¹⁴² Victim a/40006/13.

¹⁴³ Comoros Judicial Review, para. 113.

weight in the gravity analysis.¹⁴⁴ That is an error in and of itself as the OTP has failed to take proper account of relevant evidence and arrived at a factual conclusion that no reasonable person could reach. Moreover, the Prosecutor has sought to avoid her obligation genuinely to correct the errors identified by the Chamber by misusing the Appeals Chamber's finding on the assignment of weight in the gravity assessment.¹⁴⁵

89. If the Prosecutor, for example, were to acknowledge that it was a significant factor that there was evidence of a mass killing of several individuals – information clearly going to the scale of the crime – but then decided that this factor should be assigned no weight in the gravity assessment, thus resulting in the crimes being deemed insufficiently grave to be addressed by the Court, such a finding would clearly constitute an error of fact which would need to be rectified. In other words, whether relevant evidence has been taken into account and the weight to be assigned evidence are issues that are susceptible to judicial review and may result in errors of fact being identified by the Chamber which have to be rectified by the Prosecutor.

2. Sanctions and the appointment of an 'amicus' prosecutor

90. The Victims submit that the Chamber should impose appropriate sanctions on the OTP, and appoint an amicus prosecutor if necessary.
91. The Victims stress that unless it is made clear to the Prosecutor that refusing to comply with an order of the Court warrants a reprimand and sanctions, the current proceedings will continue to go round in “*a vicious cycle*”¹⁴⁶ – the Prosecutor will continue to be directed to reconsider her decision not to investigate and will return with successive reconsideration decisions which repeat the same errors.
92. The Prosecutor has already been warned in writing by the Pre-Trial Chamber that sanctions may be applied under Article 71 and Rule 171 for the deliberate refusal to comply with the Chamber's directions in its second decision requesting

¹⁴⁴ See paras. 77-79 above.

¹⁴⁵ AC Judgment, paras. 79, 81.

¹⁴⁶ Victim a/15161/15.

reconsideration on 15 November 2018.¹⁴⁷ Yet the Prosecutor in her latest decision deliberately refuses to comply with the Chamber's directions and interpretation of the law. Such recurring refusals to respect the rulings of the Chamber, particularly after a specific warning by the Chamber, should not be left without any sanction.

93. Indeed, in the *Lubanga* case, the Appeals Chamber found when considering the conduct of the Prosecutor in this case, that “*Sanctions under article 71 of the Statute are the proper mechanism for a Trial Chamber to maintain control of proceedings when faced with the deliberate refusal of a party to comply with its orders.*”¹⁴⁸ The Appeals Chamber explained that “*article 71 of the Statute provides Trial Chambers with a specific tool to maintain control of proceedings and, thereby, to ensure a fair trial when faced with the deliberate refusal of a party to comply with its directions.*”¹⁴⁹ The Chamber made clear that such sanctions are “*not merely ... to punish the offending party, but also to bring about compliance*” and “*are the normal and proper means to bring about compliance in the face of refusals to follow the orders of a Chamber.*”¹⁵⁰

94. In accordance with this decision, the Victims submit that it is appropriate in the present case to sanction the OTP including by reprimanding the Prosecutor and her Office, imposing a monetary sanction in the form of a fine based on the Prosecutor's failure to comply with the Court's rulings and the delays this has caused to the proceedings, and through any other measures deemed suitable by the Chamber. The Victims note that the Prosecutor was first requested to reconsider her decision not to investigate in July 2015 (nearly five years ago), and the Prosecutor submitted her first reconsideration decision on 29 November 2017. It is this reconsideration decision which should have genuinely and properly implemented the directions of the Pre-Trial

¹⁴⁷ Second Decision requesting Reconsideration, para. 102.

¹⁴⁸ Prosecutor v Lubanga, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled ‘Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU’, ICC-01/04-01/06-2582, 8 October 2010, para. 3.

¹⁴⁹ Prosecutor v Lubanga, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled ‘Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU’, ICC-01/04-01/06-2582, 8 October 2010, para. 59.

¹⁵⁰ Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled ‘Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU’, ICC-01/04-01/06-2582, 8 October 2010, para. 59.

Chamber in accordance with its decision of 16 July 2015. The delays in the proceedings should be calculated from this date forward – a time period of nearly two and half years.


95. The Appeals Chamber's guidance on sanctions under Article 71 and Rule 171, further stipulate that "*in cases of continuing misconduct, a new fine may be imposed on each day that the misconduct continues, and such fines shall be cumulative.*"¹⁵¹ The Victims submit that a financial penalty of increasing value should be imposed for each successive reconsideration decision which does not correct the errors set out in Decision of 16 July 2015 and apply the correct legal standard as interpreted by the Chamber.
96. Furthermore, the Victims support the Government of the Comoros's submission that an independent 'amicus' prosecutor should be appointed under Rule 103, if necessary, to reconsider the OTP's decision not to open an investigation in accordance with the Chamber's decision of 16 July 2015. As the Prosecutor has failed on two occasions after protracted proceedings to rectify the identified errors, the Chamber can exercise its powers under Rule 103 to appoint an amicus prosecutor to review the available evidence in accordance with Chamber's decision of 16 July 2015.

IV. CONCLUSION

97. For all of the reasons above, the Victims respectfully request that the Pre-Trial Chamber find that the Prosecutor has again failed to correct errors previously identified, committed new errors and refused genuinely to reconsider her decision in accordance with the findings and directions of the Pre-Trial Chamber's decision of 16 July 2015.
98. The Victims ask that (1) the Prosecutor is requested to reconsider her decision not to open an investigation and to comply in full with the Chamber's decision of 16 July

¹⁵¹ Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled 'Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU', ICC-01/04-01/06-2582, 8 October 2010, para. 59 *citing* Rule 171(4).

2015; and, (2) appropriate sanctions are imposed against the Office of the Prosecutor for its failure to comply to date with the Chamber's decision of 16 July 2015.



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